

FINDING OF EMERGENCY

The Secretary of the Department of Food and Agriculture finds that an emergency exists. This regulation is being readopted as an emergency regulation necessary for the immediate preservation of the general welfare, within the meaning of Government Code Section 11346.1.

Description of Specific Facts Which Constitute the Emergency:

The Department of Food and Agriculture has found that oak mortality disease (sudden oak death) caused by a fungus, *Phytophthora ramorum*, presents a clear and present danger to the native stands of oak and other trees, the nursery industry, other agricultural commodities and plant life (including ornamental plantings) of California. The Department adopted Section 3700 to implement a program to arrest the artificial spread of the disease. Continued action is necessary to contain and minimize the destructive impact of this pest and disease at the earliest possible time. On April 9, 2004, the Administrator of the United States Department of Agriculture (USDA), Animal and Plant Health Inspection Services (APHIS) issued the first emergency order restricting the interstate movement of nursery stock from California nurseries located outside the area regulated under Section 3700. On April 22, 2004, USDA, APHIS issued a new order that replaced that issued on April 9, 2004. On April 23, 2004, USDA, APHIS issued a clarification of its April 22, 2004 order. Through this last federal emergency order and its subsequent clarification, the USDA, APHIS identified additional plant species as regulated associated articles and as such, these associated articles are prohibited interstate movement from all California nurseries unless properly certified under the provision of the federal emergency order.

On August 26, 2004, the Department received another e-mail from the USDA, APHIS with an attachment dated August 5, 2004. The attachment was USDA, APHIS' notification that it was modifying the list of associated articles listed as regulated by federal order and designating *Calluna vulgaris* (heath), *Drimys winteri* (Winter's bark), *Laurus nobilis* (bay laurel) and *Salix capea* (Kilmarnock willow) as regulated associated articles and deregulating *Vaccinium vitis-idea* (lingonberry). The e-mail clarified that the common name of *Salix capea* should be noted as "goat willow" rather than "Kilmarnock willow." As a result, the State's regulation governing the intrastate movement of nursery stock was again amended to harmonize with this federal order.

On December 21, 2004, the USDA, APHIS issued a new federal order restricting the interstate movement of nursery stock from California, Oregon and Washington. Through this federal order, *Calluna vulgaris* (heath), *Photinia fraseri* (red tip or Fraser's photinia) and *Maianthemum racemosum* (= *Smilacina racemosa*, false Solomon's seal) were designated as host plants and *Fraxinus excelsior* (European ash), *Nothofagus oblique* (Roble beech) and *Viburnum x rhytidophylloides* (Alleghany or willowood viburnum) were designated as being regulated associated plants (nursery stock). Previously, *Calluna vulgaris* (heath) and *Maianthemum racemosum* (= *Smilacina racemosa*, false Solomon's seal) were listed as associated articles and there has been a formal scientific name change for false Solomon's seal from *Smilacina racemosa* to *Maianthemum racemosum*. As a result, it is necessary to harmonize the State's regulation governing the intrastate movement of hosts and associated articles (nursery stock) with this latest federal order.

The previous regulation Section 3700, subsection (f), included a provision whereby, unless the subsection was otherwise amended, all of Section 3700 shall be repealed effective December 31, 2004. This provision provided for the removal of the regulations without additional rulemaking, which the Department intended to allow, under the following circumstances:

- Federal domestic regulations were not adopted by the United States Department of Agriculture to limit interstate spread of the pest;
- Other states were not surveyed to confirm the absence of the pest;
- Research does not affirm that these regulations are effective in preventing the artificial spread of the pest; and,
- There are no federal international restrictions established to prevent the introduction of this fungus from those countries where it is known to occur.

All of the above actions have occurred but through an oversight, subsection (f) was not amended. As a result, Section 3700 was repealed effective December 31, 2004. This was not the intent of the Department as an emergency continues to exist and there is an immediate demonstrated need for continuing to have a State regulation governing intrastate movement of articles and commodities that may spread the disease from infested to non-

infested areas within California. Additionally, without a parallel State regulation that is substantially the same as the federal domestic quarantine and related federal orders, the USDA cannot regulate less than the entire State.

Therefore, the Department is proposing to readopt Section 3700 to continue to provide the necessary regulatory framework for a State program to continue to arrest the spread of this disease.

The Department proposes to readopt this regulation because it is necessary to continue to have authority for an established statewide program in order to arrest the artificial spread of the disease to additional areas and harmonize this regulation governing the intrastate movement of nursery stock with the federal domestic quarantine and emergency orders that governs the interstate movement of California nursery stock. Immediate amendment of this regulation is necessary to mitigate the effects of this disease on the agricultural industry, which includes native tree stands. Additionally, it is necessary to immediately amend this regulation to avoid more stringent federal restrictions being placed against the State to prevent the interstate movement of articles and commodities that may carry *Phytophthora ramorum*. Without the immediate implementation of this proposed regulatory action, the USDA, APHIS may consider the entire state as infested with *Phytophthora ramorum*, rather than just the current 14 regulated counties. If this were to occur, there would likely be additional detrimental quarantine requirements directed against California commodities by our international trade partners.

Specific facts and circumstances clearly also indicate that the spread of oak mortality disease presents a clear and imminent danger to property and, therefore, constitutes an emergency. The Department is therefore compelled to take immediate action to mitigate the damage to property and preserve the general welfare.

The Department has determined that *Phytophthora ramorum* is a serious forest pest for which control is required to prevent further spread and harm to forests, parks, commercial and urban landscapes, and watersheds. This disease is known to occur in 14 California counties. Oak mortality disease is serious due to the fact that it kills tanoak, coast live oak,

and black oak trees. The pest has been confirmed as infecting Shreve's oak and non-oak species such as rhododendron, huckleberry, bigleaf maple, California buckeye, California coffeeberry, manzanita, and toyon and other hosts causing foliar and stem disease symptoms.

The Department is also proposing to have all of its previous rulemaking activity related to *Phytophthora ramorum* incorporated by reference into this proposed regulatory action and establish that these previous rulemakings are information being relied upon.

The proposed regulation will establish restrictions to mitigate artificial spread of the fungus, *Phytophthora ramorum*, which causes oak mortality disease (sudden oak death); will establish the regulated area as the entire counties of Alameda, Contra Costa, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Mateo, Santa Clara, Santa Cruz, San Francisco, Solano and Sonoma; will establish the articles and commodities which are hosts and possible carriers of the fungus; will establish restrictions on the movement and handling of the articles and commodities covered; and will establish an appeal/hearing procedure for use if permits for movement are denied.

The proposed adoption of Section 3700 will establish these restrictions to prevent artificial spread of the pest to non-infested areas. To protect California's agricultural industry, it is necessary to immediately regulate movement of hosts and potential carriers that can transfer the pest within and from the infested area. Therefore, it is necessary to readopt Section 3700 on an emergency basis.

The proposed regulated area includes the entire counties of Alameda, Contra Costa, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Mateo, Santa Clara, Santa Cruz, San Francisco, Solano and Sonoma. These 14 counties are proposed as a regulated area, because they are considered infested and are the political divisions that provide the most workable regulated area boundary for enforcing restrictions to prevent the artificial spread of this pest. The proposed regulated area is considered the minimum area that should be regulated to prevent artificial spread of the pest to non-infested areas.

Section 3700, Oak Mortality Disease Control, subsection (a) establishes that the pest is a fungus, *Phytophthora ramorum*, which causes oak mortality disease (sudden oak death).

Subsection (b) establishes the regulated area for the pest as the entire counties of Alameda, Contra Costa, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Mateo, Santa Clara, Santa Cruz, San Francisco, Solano and Sonoma.

Subsection (c) declares plants and plant parts (except acorns or seed) of: *Acer macrophyllum* (bigleaf maple), *Aesculus californica* (California buckeye), *Arbutus menziesii* (madrone), *Arctostaphylos manzanita* (manzanita), *Calluna vulgaris* (heather), *Heteromeles arbutifolia* (Toyon or Christmas berry), *Lithocarpus densiflorus* (tanoak), *Lonicera hispidula* (a honeysuckle), *Maianthemum racemosum* (= *Smilacina racemosa*, false Solomon's seal), *Photinia fraseri* (red tip or Fraser's photinia), *Pieris Formosa* (andromeda or Himalaya pieris), *Quercus agrifolia* (coast live oak), *Quercus kelloggii* (black oak), *Quercus parvula* var. *shrevei* (Shreve's oak), *Rhamnus californica* (California coffeeberry), *Rhododendron* species (azaleas and rhododendrons), *Trientalis latifolia* (Western star flower), *Umbellularia californica* (California bay laurel), *Vaccinium ovatum* (huckleberry), *Viburnum x bodnantense* (arrowwood), *Viburnum plicatum* var. *tomentosum* (doublefile); and basal trunk/burl sprouts, small branches (less than one inch in diameter), and leaves (needles) of coast redwood (*Sequoia sempervirens*) and Douglas-fir (*Pseudotsuga menziesii* var. *menziesii*); and small branches (less than one inch in diameter) and leaves of canyon live oak (*Quercus chrysolepis*); and leaves of camellias (*Camellia* spp.) and wood rose (*Rosa gymnocarpa*); and leaves and stems of Brouwer's beauty andromeda (*Pieris floribunda* x *japonica*), forest flame andromeda (*Pieris formosa* x *japonica*); variegated and flaming silver andromeda (*Pieris japonica*); and witch hazel (*Hamamelis virginiana*); and plants and stems of laurustinus (*Viburnum tinus*); and associated articles (nursery stock) of the following plants: *Abies grandis* (grand fir), *Aesculus hippocastanum* (horse chestnut), *Arbutus unedo* (strawberry tree), *Castanea sativa* (sweet chestnut), *Clintonia andrewsiana* (Andrew's clintonia bead lily), *Corylus cornuta* (California hazelnut), *Drimys winteri* (Winter's bark), *Dryopteris arguta* (California wood fern), *Fagus sylvatica* (European beech), *Fraxinus excelsior* (European ash), *Kalmia latifolia* (mountain laurel), *Laurus nobilis* (bay laurel),

Leucothoe fontanesiana (drooping leucothoe), *Nothofagus oblique* (Roble beech), *Pieris formosa* var. *forrestii* (Chinese pieris), *Pieris formosa* var. *forrestii* x *Pieris japonica* (pieris), *Pittosporum undulatum* (Victorian box), *Pyracantha koidzumii* (Formosa firethorn), *Quercus cerris* (European turkey oak), *Quercus falcata* (Southern red oak), *Quercus ilex* (Holm oak), *Quercus rubra* (Northern red oak), *Rhamnus purshiana* (cascara), *Rubus spectabilis* (salmonberry), *Salix capea* (goat willow), *Syringa vulgaris* (lilac), *Taxus baccata* (European yew), *Taxus brevifolia* (Pacific yew), *Toxicodendron diversiloba* (poison oak), *Viburnum davidii* (David viburnum), *Viburnum farreri* (= *V. fragrans*) (Fragrant viburnum), *Viburnum lantana* (Wayfaringtree viburnum), *Viburnum opulus* (European cranberrybush viburnum), *Viburnum x burkwoodii* ((burkwood viburnum), *Viburnum x carlcephalum* x *V. utile* (viburnum), *Viburnum x pragensense* (Prague viburnum), *Viburnum x rhytidophylloides* (Alleghany or willowood viburnum); and unprocessed wood and wood products (except when completely free of bark) and plant products of the plants in paragraph (c)(1), including but not limited to bark chips, mulch, firewood, and dried or preserved wreaths; and any other product, article or means of conveyance when it is determined by the secretary, based upon generally accepted scientific principles, that it presents a risk of spreading the pest are hosts or potential carriers of the pest.

Subsection (d) establishes that articles and commodities covered are prohibited movement within or from the regulated area except as provided. This subsection provides for movement when the articles and commodities are accompanied by a certificate issued by an authorized agricultural official affirming that they have been produced and maintained in an area which has been surveyed and found to be free of the pest; or were grown, produced, manufactured, stored, or handled in a manner to prevent infestation by the pest; or were tested in a manner to detect the pest and found to be free of the pest. If the article or commodity does not meet these conditions, it may be moved under a permit specifying the required containment conditions necessary to prevent potential spread of the pest; the article or commodity covered; the destination; and the handling, utilization, or processing which is authorized and the conditions under which this shall be conducted. If a permit is denied, an appeal may be filed with the Department as provided in subsection (e).

Subsection (d) also provides for unrestricted movement of an article or commodity from outside the regulated area that is moved through the regulated area by direct route and without delay. Additionally at the retail level, articles and commodities covered are prohibited movement from or within the regulated area except when the person in possession has proof of purchase showing the commodity was purchased from a seller who is in compliance with the regulation.

Subsection (e) establishes the appeal/hearing procedures and provides that an appeal may be filed with the Department within seven (7) calendar days of the date of denial of the permit. It also establishes the specifics for conducting, recording, and issuing of a decision for the hearing.

To prevent artificial spread of the fungus to non-infested areas to protect California agricultural industry, it is immediately necessary to establish and enforce restrictions on the movement of hosts and potential carriers, which can move this pest from the infested area. Therefore, it is necessary to adopt Section 3700 on an emergency basis.

Authority and Reference Citations

Authority: Sections 407, 5321 and 5322, Food and Agricultural Code.

Reference: Sections 24.5, 5321, and 5322, Food and Agricultural Code; Sections 11425.50 and 11440.10, Government Code; Section 1084 *et seq.*, Code of Civil Procedure.

Informative Digest

Existing law obligates the Department of Food and Agriculture to protect the agricultural industry in California and prevent the spread of injurious pests (Food and Agricultural Code, Sections 401 and 403). Existing law also provides that the Secretary may establish, maintain, and enforce such regulations as he deems necessary to prevent the spread of pests to protect California's agricultural industry (Food and Agricultural Code, Section 5322).

Section 3700. Oak Mortality Disease Control.

This proposed regulation will establish control restrictions for this disease, will establish a regulated area of 14 counties, will set forth the articles and commodities covered by the regulation, will establish restrictions on the handling and movement of those articles and commodities, and will establish an appeal/hearing procedure for use if a movement permit request is denied. The effect of the regulation is to provide authority for the State to regulate movement of hosts and potential carriers of disease within and from the regulated area to prevent artificial spread of the pest to non-infested areas to protect California's agricultural industry.

Mandate on Local Agencies or School Districts

The Department of Food and Agriculture has determined that Section 3700 does not impose a mandate on local agencies or school districts, except that the agricultural commissioner of a county under regulation has a duty to enforce it. No reimbursement is required under Section 17561 of the Government Code because the 14 affected agricultural commissioners requested that they be added to the regulation.

Cost Estimate

The Department has also determined that no savings or increased costs to any state agency, no reimbursable costs or savings under Part 7 (commencing with Section 17500) of Division 4 of the Government Code to local agencies or school districts, no nondiscretionary costs or savings to local agencies or school districts, and no costs or savings in federal funding to the State will result from the proposed action.